NO. 47724-6-II Consl.

IN THE COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

TACOMA SCHOOL DISTRICT,

Appellant,

v.

TRUBY PETE, SHELIA GAVIGAN, & KATHY MCGATLIN

Respondents.

APPELLANT'S BRIEF (CORRECTED)

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II. INTRODUCTION

Tacoma School District ("District") appeals from the Honorable Superior Court Judge Frank Cuthbertson's grant of statutory writs of review,[1] under RCW 7.16.040, to three Employees of the Tacoma School District following their appeal from denials of motions for protective order from discovery asking what student educational records they provided or otherwise disclosed to third parties. The District was pursuing discipline actions against the Employees following their admissions that they disclosed to a non-District attorney student educational records and the attorney thereafter improperly redacted the records and provided them to the media, in violation of the Family Education Rights and Privacy Act, 20 U.S.C. §1232g ("FERPA"). The Superior Court's Judgement Order is fundamentally flawed in that it fails to identify what error allegedly occurred and how such error was obvious or probable and/or how the appeal allowed under RCW 28A.405.320 is not an adequate remedy at law to address any errors on appeal. RCW 7.16.040 (To establish jurisdiction to grant the writ, a petitioner must allege both that the hearing officer acted illegally or that the proceeding was erroneous **and** that no appeal or plain, speedy, and adequate remedy at law exists.). Further, the Superior Court's conclusion that the Employees had a "First Amendment Privilege or Attorney Client

[1] Because the Superior Court indicated that it did not grant the constitutional writ of review, the District only addresses the errors as they relate to the grant of the statutory writ of certiorari.

Privilege as to communications and communicative acts with [their] private attorney, including designating which documents were given to the attorney, by whom, and in what form" is wholly unsupported by any legal precedent. There can be no attorney-client privilege in third-party documents that do not contain any attorney-client communications and, in fact, pre-existed the attorney-client relationship. Nor can the balancing of interests fall to the Employees on a First Amendment claim when the student educational records at issue are expressly protected under FERPA, were unnecessary to their pursuit of a purported "whistleblower" complaint, and for which improper disclosures, such as here, subject the District to loss of federal funding for the provision of its educational programs. As such, the hearing officers did not err in denying the motions for protective order and this Court should vacate the writs of review and remand for further proceedings before the hearing officers consistent with this ruling.

III. ASSIGNMENTS OF ERROR

1. The Superior Court Failed To Identify The Alleged Error or Find That No Appeal or Adequate Remedy at Law Exists, Thus Rendering the Writs of Review Fundamentally Flawed.

2. No Clear or Obvious Error Was Established In the Absence of Controlling or Any Precedent Holding that Requiring Employees to Identify Non-Privileged, Student Educational Records Protected Under FERPA Is an Invasion of The Attorney-Client Privilege or the First Amendment Right To Petition for Redress.

IV. ISSUES OF ERROR

1. Did the Superior Court have Jurisdiction to Review and Grant the Writs of Review in the Absence of Expressly Finding and Identifying the Alleged Error(s)?

2. Did the Superior Court have Jurisdiction to Review and Grant the Writs of Review In the Absence of Expressly Finding that Employees Had No Adequate Remedy at Law to Correct Any Alleged Error(s)?

3. Did the Hearing Officers Commit Clear or Probable Error By Concluding, In the Absence of Law To the Contrary, that the Attorney-Client Privilege Was Not Invaded by Requiring Employees to Identify Non-Privileged, Student Educational Records Given to a Third-Party?

4. Did the Hearing Officers Commit Clear or Probable Error By Concluding that the Governmental Interest in Protecting Student Educational Records, as Required by FERPA, Outweighed the Purported First-Amendment Rights of the Employees to Provide Non-Privileged, Student Educational Records to a Third-Party, In Violation of FERPA?

5. Even if the Hearing Officers Committed Error, Is the Employees' Statutory Right to Appeal An Adequate Remedy At Law Through Which To Correct Any Alleged Error?

V. STATEMENT OF THE CASE

In or about August of 2014, Truby Pete, Shelia Gavigan, and Kathy McGatlin (referred to collectively as "Employees"), alone and in concert with each other, improperly removed from the District, private, protected, and confidential student educational records with personally identifiable information - including records that contained students' grade reports, transcripts, and class information - without parental or

District consent. While the District has thus far been prevented from discerning the extent of the removal and disclosures due to the Employees' refusal to cooperate in the investigation, it was learned on September 3, 2014, that the Employees provided their attorney, Joan Mell of III Branches, PLLC, with unredacted copies of the records. CP 111-12; CP 128-30. The District learned of these removals and disclosures following print and television news reports that expressly indicated student records had been provided to them by the Employees. CP 97. In fact, in a televised KING 5 news report, student transcripts and student schedules with unofficial and crude redaction marks were actually displayed on the screen. *Id.* Notably, in the course of investigation, neither employee has denied that she had given protected student educational records to her attorney or other third parties. CP 132, 322, 527.

The circumstances under which an educational agency, or school district, may release student educational records is dictated by the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1) ("FERPA") and incorporated into Tacoma School District Policy 3231 and Regulation 3231R. *See* 20 U.S.C. 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students without the written consent of their parents....") and CP 20, 37, 96, 98. The failure to comply with FERPA's strict

dictates concerning to whom and under what circumstances release may be made subjects a school district to potential loss of federal funding. 20 U.S.C. § 1232g(b)(1)(A). In short, FERPA and it's regulations, 34 C.F.R. Part 99, make clear that educational agencies without prior consent may only disclose personally identifiable information from a student education record to a school official with a legitimate educational interest or to a party performing services directly on behalf of and under direct control of the school district. 34 C.F.R. Part 99.31(a). Neither III Branches, PLLC, nor Joan Mell are school officials or were acting on behalf of the District, as defined under 34 C.F.R. Part 99.31(a), District Policy 3231, or District Regulation 3231R and, thus, are not authorized by the District or the affected students and/or their parents to view, possess, or disclose any students' private and protected records without consent. While there is also a process allowed for investigative agencies to request and obtain access to student educational records under FERPA, 20 U.S.C. 1232g(b), there is no allegation here that Joan Mell and/or her private law firm, III Branches, PLLC, were acting in that capacity.

A. FERPA makes clear that providing a non-District attorney access to student records or information therein is a disclosure and that the only party entitled to redact the records is the educational agency.

FERPA regulations define a disclosure as "permit[ting] access to or the release, transfer, or other communication of personally identifiable

information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 C.F.R. Part 99.3. 34 C.F.R. Part 99.31 further explains that such a disclosure of personally identifiable information without student or parent consent can only be made to school officials, to include consultants or contractors, when under the *direct control* of the educational agency. 34 C.F.R. Part 99.31(a)(1). Personally identifiable information is not just limited to names and personal identifiers, but includes "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. Part 99.3. Thus, the regulations make clear that providing student grade reports and transcripts and identifiable facts regarding a student to a non-District attorney without consent is a disclosure of personally identifiable information in violation of FERPA. There is no statute, regulation, or case law stating otherwise.

B. Employees were not pursuing a "whistleblower" complaint, and even if they were, state law does not authorize the use of confidential information to support such whistleblower complaint.

Although the Employees have claimed that their disclosures were in furtherance of pursuing a "whistleblower" complaint, review of the

August 27, 2014, email complaint makes clear that the bulk of the Employees' issues concerned grievances with District actions in administrative decision-making and performance evaluations. CP 86-95; CP 128-30. These sorts of complaints and grievances are expressly excluded from RCW 42.41.020(1)(b) as qualifying whistleblower activity. Moreover, even if these complaints and grievances could constitute whistleblowing under RCW 42.41.020, RCW 42.41.045(2) explicitly does ***not*** authorize an individual to disclose information prohibited by law in order to support any such whistleblowing activity. As such, there was no legal or actual basis for the private and confidential student education records to be disclosed by the Employees.

Accordingly, by letters on September 9, and 11, 2014, the Employees were directed to immediately return all protected student materials and information, including the unredacted student records originally disclosed to their attorney, Joan Mell. CP 128-30. The Employees, however, did not return the records or otherwise respond. In communication dated September 24, 2014, the District reiterated that the Employees had improperly disclosed material and again referenced their obligation to return their records. *Id.* Having received no response to its three prior communications, on September 25, 2014, the District sent a letter warning that it would have no choice but to file a suit for replevin (return of property) and injunctive relief given the Employees' refusal to respond or otherwise provide assurances the conduct would not be repeated and the Department of Education's mandate that school districts

must take all reasonable and necessary steps to retrieve student data and prevent further disclosures. *Id.*; *see also*, CP 97-98. Again, the Employees did not respond. Finally, although the September 25, 2014, letter had warned a suit would be filed September 29, 2014, barring response, the District waited to file suit in Pierce County Superior Court until October 1, 2014. *Id.* Almost one month after the disclosure first came to light and several unsuccessful attempts to gain cooperative response from the Employees and their attorney.

C. Employees' failure to respond in any fashion prior to the District pursuing legal action wholly undermines their later claim that they sought to work with the District on an agreed protocol.

Less than four hours after the District provided Ms. Mell a courtesy copy of the complaint pleadings, Ms. Mell responded by "offering" not to disseminate the confidential records she acknowledged possessing for over one month. CP 60-63. Notably, this "promise not to disseminate" the records relied on by the Petitioner came *for the first time after the employees had already disclosed the records to their attorney, after the employees and/or their attorney had disclosed the records to the news media, after they had failed to respond to four letters requesting their return for over one month, and after the lawsuit was already filed.* CP 128-30. Clearly, this does not reflect a good faith agreement not to disseminate on which the District could reasonably be expected to rely to protect its necessary federal funding.

D. The student records were unnecessary to pursuit of a credible whistleblower complaint as evidenced by the PSESD and OCR investigations initiated by the Employees.

Since the progression of the separate civil lawsuit and the discipline matters, the Employees have filed complaints with the U.S. Department of Education Office of Civil Rights ("OCR"), and with the Puget Sound Educational Service District ("PSESD"). Review of the PSESD complaint reveals that it is materially different from the August 2014 complaint submitted to the District or the media and comprises exclusively inflammatory and unsupported allegations. Compare CP 547-550 with CP 86-95. Particularly undermining the Employees' claims that the records were necessary to support a credible whistleblower complaint, the Employees submitted the complaint to PSESD without attaching any student records or personally identifiable information of any student. With respect to the OCR complaint, OCR itself noted that the complaint filed with the District in August 2014, alleges different causes of action than those put before OCR. CP 53-56 (finding on p. 4 that the Complaint filed with the district on August 27th "does ***not*** allege any violations of Title VI, Section 504, or Title II," which contrasts with OCR's finding on p. 1 that the allegations submitted to it "raise a possible violation of Title VI.")(emphasis added). All of this refutes the Employees' claims they were engaged in legitimate whistleblowing and, instead, supports the District's argument

that the actual student records were unnecessary to make a "whistleblower" complaint and to initiate investigation.

E. Motion for Protective Order Was Properly Denied

On October 31, 2014, the District sent its Notice advising the Employees that there was sufficient cause to issue a ten-day suspension for disclosing student records to third parties without proper consent and for insubordination for refusing to return the records despite request of the District. *See* CP 20, 37, 99, 128, 159. Employees sought a hearing, as allowed by RCW 28A.405.310, with the parties agreeing to (Ret.) Judge Terry Lukens and (Ret.) Judge Deborah Fleck presiding as Hearing Officers.

In keeping with the discovery allowed under RCW 28A.405.310, the District served interrogatories and requests for production asking the Employees to identify all student educational records disclosed to third parties. CP 99, 160. In response, the Employees objected and refused to respond on assertion of attorney-client privilege; thereafter, Employees submitted Motions for Protective Order to Hearing Officers Lukens and Fleck seeking to preclude inquiry into what student educational records were provided to third parties.

Following extensive briefing and argument, both Hearing Officers Lukens and Fleck denied the Motions for Protective Order. Hearing Officer Fleck, presiding over the Pete and McGatlin matters, concluded that: 1) Washington's attorney-client privilege, as stated by *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 745 P.3d 60 (2007), does

not protect inquiry into the transmission of these school district records; and 2) in the absence of clear authority in Washington that the First Amendment protects the transmission of government records which are specifically protected by law, such as the student educational records at issue here, the motion for protective order would be denied. CP 18-26 and 574-582. Hearing Officer Lukens concluded that: 1) the attorney-client privilege does not cover "any questions regarding the delivery of student records to Ms. Mell or another third party"; and 2) with respect to the First Amendment analysis, the Employees' cases were distinguishable from the D.C. Circuit cases cited because the instant cases do not involve prior restraint; and 3) the balancing of interests of the government and the employee tips in favor of the student and the [District] in a First Amendment analysis, given that the documents in question are protected by FERPA. CP 213-215. Dissatisfied with the hearing officers' conclusions, the Employees filed applications for writs of review under RCW 7.16.040 and Article 4, Section 6, before Superior Court Judge Frank Cuthbertson.

F. Statutory Writ of Review Granted Erroneously

At the hearing on the Writs of Review, Judge Cuthbertson acknowledged that this was a matter of first impression in Washington. RP 51. Despite agreeing with Judge Fleck and acknowledging the total absence of controlling precedent that would support a finding of probable or obvious error, however, Judge Cuthbertson granted the statutory writs of certiorari. In the Judgement Order granting review of

the statutory writ, the Superior Court made several "findings of fact," all of which are more appropriately categorized as conclusions of law. *See* Judgment, CP 190-192.

Specifically, the Superior Court's Judgment Order finds:

> "1. Petitioner has met the requirements for a grant of statutory certiorari.
>
> 2. The Hearing Officer committed error by failing to enter the protective order in this matter.
>
> 3. The status quo of the parties would be altered by failing to enter the protective order, and the rights of the Petitioner would be destroyed.
>
> 4. The Petitioner has a First Amendment Privilege or Attorney Client Privilege as to communications and communicative acts with her private attorney, including designating which documents were given to the attorney, by whom, and in what form. *Jacobs v. Schiffer*, 204 F.3d 259 (D.C. Cir. 2000)."

The District's instant appeal under RCW 7.16.350 followed.

VI. ARGUMENT

The Superior Court's grant of the extraordinary remedy in this case was made without the necessary findings and ultimately erroneous. Respectfully, Judge Cuthbertson's Judgment fails to even identify what the alleged error is, suggesting that no actual error was identified, or the basis for finding that the error was obvious or probable given the state of the controlling legal authority on the extent of the attorney-client and First Amendment privileges. Nor did Judge Cuthbertson address how the Employees' statutory appeal is not adequate to respond to any alleged discovery errors as determined by a reviewing court. The scope

of review under the statutory writ is significantly more limited than an appeal. *Coballes v. Spokane Co.*, 167 Wn.App. 857, 867, 274 P.3d 1102 (2012). The Employees' failure to establish both that the hearing officers' decisions are so erroneous as to be illegal and that they lack other means for appeal or adequate remedy at law actually deprived the Superior Court of jurisdiction to hear the statutory writ.

A. Standard of Review

The Superior Court's disposition of an application for an extraordinary writ, is appealable as a final judgment. RCW 7.16.350 (From a final judgment in the superior court, in any such proceeding, appellate review by the supreme court or the court of appeals may be sought as in other actions.). This Court's review, therefore, is *de novo*. *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010)("We review the superior court's decision whether to grant a writ of review de novo."). While the Superior Court included in its Judgment "Findings of Fact," review of these findings reveal that they are clearly conclusions of law. *See e.g.*, CP 190-92 (Conclusions included, "Hearing Officer committed error," "The rights of the Petitioner would be destroyed," "Petitioner has a First Amendment Privilege or Attorney Client as to communications...."). As such, they are subject to full *de novo* review and not given deference as factual findings.

B. Statutory Writ under RCW 7.16

A writ of review is an extraordinary remedy authorized by statute and should only be granted sparingly. *Holifield*, 170 Wn.2d at 239-40.

To establish the Superior Court's jurisdiction to grant the writ, employees were required to establish both that the hearing officer exceeded his jurisdiction/authority or acted illegally ***and*** that no appeal or plain, speedy, and adequate remedy at law exists. RCW 7.16.040; *see also*, *Holifield*, 170 Wn.2d at 240-41 (analyzing the two independent prongs that must be satisfied before a court has jurisdiction to review and grant a statutory writ of review)(emphasis added).

1. Granting the Writs in The Absence of Necessary Findings Renders them Fundamentally Flawed and Subject to Reversal on That Basis Alone.

The Superior Court's failure to explicitly state the alleged error or the basis for finding error demonstrates the flaws in the court's thinking. *See* Judgment, CP 191 ("Petitioner has a First Amendment ***or*** Attorney Client Privilege....")(emphasis added). More importantly, the court's failure to expressly find that the Employees lacked other means for appeal, despite the statutory appeal provided by RCW 28A.405.320, deprived the court of jurisdiction to grant the writ. *Coballes*, 167 Wn. App. at 866 ("the absence of a right of appeal or plan, speedy, and adequate remedy at law is recognized as an essential element of the superior court's jurisdiction to grant a statutory writ of review."); *see also*, *Holifield*, 170 Wn.2d at 240 ("Unless both elements are present, the superior court has no jurisdiction for review.").

Further, the Superior Court's citation to *Jacobs* to support its conclusory finding that "the Petitioner has a First Amendment Privilege

or Attorney-Client Privilege as to communications and communicative acts with her private attorney, including designating which documents were given to the attorney, by whom, and in what form" is baffling. Thorough review of the D.C. Circuit Court's opinion in *Jacobs* does not reveal a statement from the Circuit Court that governmental employees have a First Amendment privilege or attorney-client privilege precluding them from ever designating which documents were given to an attorney. Indeed, as explained further below, the *Jacobs* court expressly stated the contrary, that, "the First Amendment does ***not*** provide a federal employee seeking legal advice regarding a dispute with the employing agency with *carte blanche* authority to disclose any and all confidential governmental information to the employee's attorney...." *Jacobs v. Schiffer*, 204 F.3d 259, 265 (D.C. Cir. 2000)(emphasis added). Nor does the *Jacobs* court address the applicability of the attorney-client privilege to third-party documents not containing any attorney-client communications, whether in D.C. or Washington State. In short, the Superior Court's grant of the extraordinary writs appears based on its own *de novo* review of the law, rather than any finding of error by the hearing officers. Finally, the Superior Court's findings are actually contrary to existing Washington law and the circuit court's opinion in *Jacobs*.

2. <u>The Hearing Officers' Denial of the Motion for Protective Order was Neither Obvious Or Probable Error.</u>

The Washington Supreme Court in *Holifield* defined acted "illegally," for purposes of RCW 7.16.040, as when an inferior tribunal, board, or officer, "(1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court." *Holifield*, 170 Wn.2d at 244-45 (noting that these standards are "specific and stringent" and not so lax that they would apply only to correct "mere errors of law.").

Here, there was no law cited contrary to the hearing officers' decisions—either as expressed by a court in Washington or elsewhere. Employees argued, and the Superior Court adopted, a lower standard that amounts to essentially mere error of law in the hearing officers' determinations not to grant motions for protective order to preclude the District from inquiring as to what student educational records were disclosed by the Employees to third parties in violation of state and federal law and District policy and procedure. Indeed, as noted in the Motions for Protective Order, CP 38, 229, and 423, whether to grant a protective order is within the discretion of the judicial officer and may only be granted on showing of good cause. *Accord Holifield*, 170 Wn.2d at 246 (concluding that even if a court had improperly suppressed evidence it would constitute "at most a mere error of law that, without more, would not justify issuance of a writ of review.").

In support of their Motions for Protective Order, the Employees argued that any inquiry into what third party records they disclosed to their attorney was protected by the attorney-client privilege and that their First Amendment right to pursue a whistleblower complaint, despite the limitations of FERPA and RCW 42.41.045, outweighed the students' and District's interests in protecting the records.

i. Attorney-Client privilege does not preclude inquiry into third party records transmitted to third parties.

As an initial matter, the District notes that it sought to inquire into the provision and disclosure of confidential student and district records to *third parties* as the basis for the discipline. The discovery sought is not limited to documents given to counsel and, thus, no privilege issues would limit questioning as it relates to third parties. Further, even assuming the attorney-client privilege could preclude direct questioning into what documents were provided to an attorney, there is no similar concern if the question is simply, "provide or identify all student records given to third parties."

In support of their Applications for Writ of Review, the Employees relied on *Mitchell v. Superior Court*, 37 Cal. 3d 591, 691 P.2d 641 (1984), a **California** case, for the argument that the privilege in Washington should extend to protect the transmission of documents that do not themselves contain a privileged communication. As argued by the District, however, the Washington Supreme Court's analysis in *Soter*

v. Cowles Publ'g Co., 162 Wn. 2d 716, 174 P.3d 60 (2007) would not support such an extension. In a thorough and lengthy discussion of the interplay between the attorney-client privilege and work-product protection, the *Soter* court confirmed that the privilege protection is intended to protect the communication of some information that would not otherwise be shared for fear of discovery. *Soter*, 162 Wn. 2d at 745 ("privilege applies to communications and advice between an attorney and client and extends to documents that *contain* a privileged communication.").[2] *See contra*, *Mitchell*, 37 Cal.3d at 601 (discussion indicating that California does not appreciate distinction between legal advice and factual information). Thus, *Mitchell* is not only non-persuasive, it is contrary to how our own Supreme Court would rule in this matter.

By contrast, the District relied on Washington law, including *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1995) and U.S. Supreme Court precedent, *Fisher v. United States*, 425 U.S. 391, 403-05 (1976) ("Pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice."). In *R.A. Hanson Co., Inc. v. Magnuson*, the court held that the

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[2] Employees' reliance on *State v. Perrow* was misplaced where the narrative at issue was indisputably prepared by the client after she had been served with a protection order and contacted an attorney. In this case, it is undisputed that the student records at issue were ***not*** prepared by the employee or for the purposes of the attorney-client relationship.

transfer of money by an attorney for a client is not protected by attorney-client privilege. As that court stated, "The purpose of the privilege is to allow a client to obtain proper legal advice. The act of transferring money for a client does not constitute a confidential professional communication or advice." *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1995). The transfer of the FERPA documents by the Employees to third parties is similar to the type of transaction in *R.A.* in that the act of transferring the documents was similar to the act of transferring money: the act was merely the movement of a material object from one person to another, containing no legal advice and no specific communication. Merely because an attorney is involved does not render every act concerning a client a privileged act for which inquiry is prohibited.

Given the statement of the attorney-client privilege expressed by the Washington Supreme Court in *Soter* and the absence of any controlling law factually on point, it cannot be said that Hearing Officers Lukens and Fleck made errors of law so egregious that they can be found to have acted "illegally."

ii. Petitioner's First Amendment Rights Do Not Outweigh the Interests of the Student and District.

In support of their argument that their First Amendment rights outweighed those of the affected students and the District, Employees

relied primarily on two D.C. Circuit cases: *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982), and *Jacobs v. Schiffer*, 204 F.3d 259 (2000).

In *Martin v. Lauer*, the employing agency initially sought to implement a blanket prospective and post-hoc restriction on release or use of any information by employees in litigation regardless of whether it was ultimately determined that the materials were subject to privacy limitations under the Freedom of Information Act ("FOIA"). Importantly, in *Martin*, the court limited its injunction and subsequent opinion to the sole issue of whether forced inquiry into *oral* communications between employees and their attorneys was permissible under the First Amendment; it expressly did not address the "legitimate interests of government agencies to require their employees to comply with applicable regulations for the disbursal of documents." *Martin*, 686 F.2d at 29-30, fn. 24 (appellants' motion to stay order disclosing prior communications with counsel ***denied*** insofar as it concerned disclosure of "documents physically transferred or shown to their attorneys."). The *Martin* court never directly reached the issue of document transfer being protected under the First Amendment precisely because the issue was moot based on the court's denial of the motion to stay as to the part of the appealed order. As this Court is aware, it is significant that the D.C. Circuit Court stayed that portion of the trial court's order as it related to oral communications, but not document transfer. Denying stay relief acts as an implicit rejection of the merit to that argument.

Further and most relevant to this appeal, in discussing inquiry into oral communications with attorneys, the *Martin* court did not preclude disciplining employees for failing to reveal a document read verbatim to their attorneys "*since such a communication is equivalent to appellants' showing of the document to their attorneys.*" *Martin*, 686 F.2d at 35, fn.45 (emphasis added). This again is an implicit acknowledgement that an employee being required to disclose to their employer any documents shown to their attorney was not a violation of the employee's First Amendment rights. Thus, *Martin* actually supports Tacoma School District's position in this case.

Jacobs v. Schiffer is also distinguishable; the most significant distinguishing factor, of course, is that in *Jacobs*, the attorney and the client sought to cooperate with the employer to determine how best to proceed with allowing access to internal documents. There, the employer failed to respond to request from Jacobs' counsel to engage in a collaborative process and/or indicate objection as soon as possible. *Jacobs v. Schiffer*, 204 F.3d 259, 261 (in which employer put significant and unreasonable limitations on access to and use of the records at issue, yet the court nonetheless noted "the First Amendment does not provide a federal employee seeking legal advice regarding a dispute with the employing agency with carte blanche authority to disclose any and all confidential government information to the employee's attorney"). The federal government's refusal to respond reasonably, coupled with counsel's proactive efforts to seek prior approval and come to agreement

were clearly dispositive for the *Jacobs'* court. Thus, the balancing test fashioned by the court included "whether the attorney is likely to keep this information in confidence, as suggested by willingness to enter into a protective order." *Jacobs*, 204 F.3d at 265-66. By contrast here, not only did the attorney publish the records to several media outlets, albeit crudely and ineffectively redacted, she did not respond to entreaties by the District to return the records or otherwise respond. Ms. Mell's offer to not "disseminate" the records did not come until *after* they had already been disseminated to the media and possibly others, and *after* the lawsuit had already been filed and she had received notice of same.[3] These facts alone distinguish the instant matter from the equitable considerations to access discussed in *Jacobs*. *See also*, *Martin*, 686 F.2d at 32 (noting that when employees reveal the information or authorize their attorney to do so, the balance between government's interests and the employees' might well shift [to the government]).

The *Jacobs'* court was also concerned about what was effectively the government's "absolute embargo" on use of governmental records thus depriving the employee with any means to share the information. *Jacobs*, 204 F.3d at 266. The District, however, unlike the government in *Jacobs*, offered alternative means to the Employees for how they could access the records without running afoul of the students' privacy

[3] Indeed, the offer to segregate the documents did not come until *after* the Employees and Joan Mell had received no less than four separate letters requesting return of the records and to which they simply refused to respond in any manner.

rights, FERPA, and the District's policies and procedures. Indeed, as suggested by the District, if the employees or counsel had served a records request under the Washington Public Records Act, RCW 42.56 *et seq.*, they would have been provided with student records redacted as dictated by 34 C.F.R. Part 99.31(b)(1).[4]

The documents at issue in *Jacobs*, just as in *Martin*, were not themselves explicitly protected by federal statute as opposed to simply being FOIA-exempt. *Jacobs*, 204 F.3d at 262 (in which trial court conducted *in camera* review of records and found that "it is clear on this record that Mr. Jacobs could show his attorney some, if not all, of the documents that he would like to disclose without violating any statute or regulation."). This unclear or weak governmental interest was also dispositive to the *Martin* court's conclusions. Again, by contrast, at issue here is the disclosure of student records for which Congress has granted express and standalone protection from disclosure to persons not authorized under the law. *See Martin*, 686 F.2d at 27-28 ("government's interest in nondisclosure is generally greater when a specific statute [such as FERPA] prohibits dissemination of information").

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[4] 34 C.F.R. 99.31(b)(1) dictates that "an educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by §99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information." Thus, only the District or a party that has legitimately received education records is authorized to redact and only after making an informed and reasonable determination that no student could be identified from the redacted material taking into account other reasonably available information.

Finally, unlike *Jacobs*, the documents at issue here were not ***material*** to the Employees' whistle-blower complaint. *Jacobs*, 204 F.3d at 261-62 (listing the three categories of documents sought to be disclosed to the attorney and explicitly noting that all were "***material*** to the whistleblower complaint.")(emphasis added). The student records disclosed by the Employees here were not material to their alleged whistleblower complaint, as evidenced by the fact that the only administrative agencies to accept their complaint as a "whistleblower" complaint either received a materially different whistleblower complaint or complaint that was not accompanied by any student records. Thus proving that student records were wholly unnecessary to the assertion of a whistleblower complaint for purposes of initiating an investigation.

Thus, under the law presented to the Hearing Officers, no good cause was shown to grant a protective order precluding the District from inquiring as to what student educational records were disclosed to third parties by the Employees.

3. Employees Have a Statutory Right to Appeal

Even if the Employees successfully alleged error significant enough that it rises to the level of illegality, which they have not, they must still establish that they lack any right of appeal or one that is plain, speedy, or adequate enough to remedy the error. *Holifield*, 170 Wn.2d at 240 ("Unless both elements are present, the superior court has no jurisdiction for review.").

RCW 28A.405.320 grants an employee the exclusive right to appeal from any decision or order adversely affecting his or her contract status, to include, as in this case, an unpaid suspension. Further, RCW 28A.405.340 makes clear the appeal shall be heard by the superior court expeditiously and may reach any alleged abridgment of the employee's constitutional free speech rights or other alleged unlawful procedure or error of law. As such, there is a statutory appellate process adequate to address the Employees' concerns.

Employees argued that the inability to appeal an interlocutory order rendered the remedy inadequate for vindicating their rights. However, the fact that an appeal will not lie directly from an interlocutory order is not a sufficient basis for a statutory writ of review if there is an adequate remedy by appeal from the final judgment. *Dep't of Labor and Indus. v. Bd. Of Indus. Ins. Appeals*, 347 P.3d 63, 65 (Jan. 26, 2015) (affirming that if a party has a statutory right to appeal, a statutory writ of review is unavailable even for interlocutory orders as long as reviewable on appeal). Thus, regardless of the errors alleged in the interlocutory order, to the extent that they can be appealed from final judgment, no writ can issue under RCW 7.16.040.

VII. CONCLUSION

For all the foregoing reasons, the District respectfully requests that this Court reverse the Superior Court's erroneous grant of the statutory writs of review to these employees and remand for proceedings

consistent with its opinion, including discovery into the student educational records provided or disclosed to third parties.

RESPECTFULLY SUBMITTED this 3rd day of February, 2016

PATTERSON BUCHANAN
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CERTIFICATE OF SERVICE

I, Angela Marino, hereby declare that on this 4th day of February, 2016, I caused a true and correct copy of the foregoing to be served on following in the manner indicated below:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Washington State Court of Appeals, Division II 950 Broadway, Ste. 300 MS TB-06 Tacoma, WA 98402-4454	☐ Electronic Mail ■ ABC Legal Messenger Service ☐ Regular U.S. Mail ☐ Other: _____
Ms. Harriet Strasberg 203- 4th Ave E. Suite 520 Olympia, WA 98501 Email: hstrasberg@comcast.net	■ Electronic Mail ☐ ABC Legal Messenger Service ☐ Regular U.S. Mail ☐ Other: _____
Mr. Tyler K. Firkins Van Siclen Stocks & Firkins 721 - 45th St. N.E. Auburn, WA 98002 Email: tfirkins@vansiclen.com	■ Electronic Mail ☐ ABC Legal Messenger Service ☐ Regular U.S. Mail ☐ Other: _____

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 4th day of February, 2016, at Seattle, Washington.

A. M

Angela Marino
Legal Assistant

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